

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No 214 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE A.L.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES
 2. To be referred to the Reporter or not? : NO
 3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
 4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
 5. Whether it is to be circulated to the Civil Judge? : NO

PRAHLADBHAI BACHARBHAI PATEL

Versus

BABLUBHAI ALIAS MOTABHAI AMTHABHAI PATEL, DECEASED BY HEIRS

Appearance:

MR PJ VYAS for Appellants

MR TRILOK J PATEL for MR JM PATEL for Respondent No. 1

CORAM : MR.JUSTICE A.L.DAVE

Date of decision: 01/09/2000

ORAL JUDGEMENT

1. The present appeal arises out of a judgment and decree passed by the learned Second Extra Assistant Judge of Kheda, at Nadiad, in Civil Appeal No.242 of 1980, on 7.1.1983. The said appeal arose out of a judgment and decree passed by the learned Civil Judge (J.D.), Nadiad,

in Regular Civil Suit No.366 of 1975.

2. The facts, in brief, leading to the present appeal can be narrated thus :-

2.1 The present appellants are the original plaintiffs in the suit and present respondents are the heirs of original defendant. For the sake of convenience, the appellants are addressed as the "plaintiffs" and the respondents as "the defendant" in the judgment.

2.2 The plaintiffs are the owners of agricultural land bearing survey No.303/3 situate in the outskirts of village Ghogawada, taluka Nadiad of Kheda district. The land runs in the joint names of the all the three plaintiffs and for their convenience, they have partitioned the land and are cultivating those portions independently of each other. The northern portion admeasuring 1 acre and 7 Gunthas is being cultivated by plaintiffs No.1 and 2 while the southern portion is being cultivated by plaintiff No.3.

2.3 To the west of the plaintiffs' land is situate survey No.303/2 owned by the defendant. To the north of survey No.303/3 and 303/2 is situate survey No.303/1. To the east of survey No.303/3 and survey No.303/1 is a public way. According to the plaintiffs, the defendant is trying to create a right of way through survey No.303/3 to the defendant's field survey No.303/2 along the northern boundary of the plaintiffs' filed 303/3. According to the plaintiffs, the defendant has no such right of way and, therefore, by preferring the suit, they sought a declaration and injunction against the defendant.

2.4 The case of the defendant, on the other hand, as emerging from the written statement Ex.14 is that survey No.303/2 is surrounded by other fields on all four sides. According to him, from the time of his forefathers since time immemorial they have been entering their field survey No.303/2 from the public way to the east of 303/3 through the plaintiffs' field along the northern boundary of that field. It is contended by the defendant that the plaintiffs had earlier preferred a suit, which was withdrawn by them with a permission to file a fresh suit. According to the defendant, land bearing survey Nos.303/3, 303/2 and 303/1 was a single piece of land which was subsequently divided into three parts. One of the parts is owned by the plaintiffs and the other parts by the defendant. The only way to the defendant's field

from the public road is, therefore, through survey No.303/3.

2.5 Both the parties led their respective evidence oral as well as documentary. The learned Trial Judge, after recording the said evidence and considering rival side contentions, came to a conclusion that the defendant was proved to have made attempts to create a new right of way to his field through the field of the plaintiffs. The learned Trial Judge also came to a conclusion that the defendant has failed to prove his right from time immemorial by way of any easement of necessity. The Trial Court, ultimately, decreed the suit.

3. Aggrieved by the judgment and decree, the defendant approached the Lower Appellate Court with Civil Appeal No.242 of 1980. The Lower Appellate Court addressed itself to the question as to whether the Lower Court erred in holding that the defendant has failed to prove his right of way from over the land of the plaintiffs by immemorial user or by way of necessity. The Lower Appellate Court found that an error was committed by the Trial Court in coming that finding and also in decreeing the suit. The Lower Appellate Court, therefore, allowed the appeal and set aside the judgment and decree passed in the Civil Suit, dismissing the plaintiffs' suit.

3.1 The Lower Appellate Court took into consideration the map drawn by the Court Commissioner. It also took into consideration copy of records of right over the years 1918-19 to 1924-25. The Court also considered a sketch produced at Ex.60 in respect of survey No.303, another sketch produced at Ex.59, drawn on December 14, 1914 and observed that survey No.303 was later on divided into three parts because earlier sketch at Ex.60 did not show sub-divisions of survey No.303. By reading Ex.59 and 60, the Lower Appellate Court observed that there was a public way touching survey No.303. The Court also observed that there is a public way touching this land towards west. It was also observed that survey No.302 is touching the field survey No.303 towards north on the western boundary and another survey No.304 is touching survey No.303 towards south on the western boundary. Originally, therefore, there was only one way to field survey No.303 from the public way towards its east.

3.2 The learned Lower Appellate Judge also took into consideration deposition of the plaintiff and his admissions made therein to the effect that the cart track passing through the field of Ishwarbhai Chhaganbhai, i.e.

survey No.302 comprises of land left open from the field. It was also admitted that it was private road and that the passage which goes through survey Nos.302 and 304 is used by the owners of the field shown in the map, i.e. respective owners of sub-divisions of survey Nos.304 and 302. It would be worthwhile to note that defendant-Babubhai Amthabhai also owned some portions of survey No.304, i.e. 304/2 and 304/4 Paiki, as is indicated in a map Ex.32. The Lower Appellate Court, therefore, concluded that, even if the defendant approached survey No.303/2 from its south western corner by that private road, it was only by way of convenience and it cannot destroy the defendant's right of way through survey No.303/3 because it is not the case of the plaintiffs that the right of user enjoyed by the defendant through survey No.303/3 got extinguished by non-exercise of that right. The Lower Appellate Court also considered the aspect that the field of the plaintiff was cultivated since 1975 by one Balchand Mohanbhai, who could have been the best person to throw light on behalf of the plaintiffs as to the existing situation, but the plaintiffs did not examine Balchand Mohanbhai. Keeping all these aspects, the Lower Appellate Court found that the passage suggested by the plaintiffs could never have been the way of defendant's field. It may be that because of his other fields situate along the private road he may be entering his field 303/2 from south west corner occasionally. The Lower Appellate Court, therefore, ultimately, allowed the appeal and dismissed the plaintiffs' suit.

4. While admitting this appeal, this Court formulated the following question :-

- (1) Whether the Lower Appellate Court committed an error in law in dismissing the plaintiffs' suit even though it came to the conclusion that the defendants were using the western passage for entry into survey No.303/2?

5. Heard learned advocate, Mr. P.J. Vyas, for the appellants and Mr. Trilok J. Patel for the respondents. Mr. Vyas has taken this Court through the record and proceedings of the Trial Court. He vehemently submitted that the Lower Appellate Court committed an error in allowing the appeal. According to him, when there is an access to the land through western way at the south western corner of the field of survey No.303/2, the defendant could not have asserted his right of way through survey No.303/3 and, therefore, the appeal may be allowed.

6. Mr. Patel, on the other hand, has supported the judgment of the Lower Appellate Court by highlighting the reasonings adopted by the Lower Appellate Court.

7. Having gone through the record and proceedings of the Trial Court and the judgments of both the Courts below, this Court is of the view that no interference is called for in the judgment rendered by the Lower Appellate Court. The judgment is based on findings of fact and this Court is not inclined to and cannot interfere with those findings of fact. Even after examining the facts of the case, this Court does not find any error to have been committed by the Lower Appellate Court.

8. Focussing on the question formulated by this Court while admitting this appeal, on going through the judgment, it is apparent that the Lower Appellate Court has only observed that the defendant may be occasionally using the western passage to enter survey No.303/2 through its south west corner, but that is because of his other fields situate on that side and it is only a user by way of convenience. This view is rightly based on basis of documentary evidence in nature of old records of rights as well as on basis of old maps produced on record of the case. The conclusion is arrived at by correct interpretation of such evidence and its overall assessment. If survey No.303/2 and 303/3 were originally part of survey No.303 and if it is found that 303/3 is surrounded with other fields, the access to and from public way has to be through survey No.303/3. This fact finds support from the report of the Court Commission which indicates existence of the cart-track along northern boundary of survey No.303/3 connecting survey No.303/2 with the public way to east of survey No.303/3. There is substantial force in the observation made by the Lower Appellate Court and, therefore, it cannot be said that the Lower Appellate Court has committed any error in allowing the appeal and dismissing the suit while observing that defendants were using the western passage for enter to survey No.303/2. The Lower Appellate Court has concluded that this passage was being used regularly and by way of right. In fact, the Lower Appellate Court observed that original survey No.303 was one piece of land which was divided into three parts. Survey No.303 had an access by public road situate on its east and by virtue of its division, survey No.303/2 came to be surrounded by fields on all sides and, therefore, the access naturally would be through survey No. 303/3. For taking this view, the Lower Appellate Court also derived

support from the Panchnama made by the Court Commissioner which indicated that there was cart track which could be found only if it is regularly used. Further, the defendant had examined witnesses to show that the defendant never used the way on the western side for access to survey No.303/2. Under these circumstances, this Court is not inclined to entertain this appeal. No interference is called for in the judgment and decree of the First Appellate Court in Civil Appeal No.242 of 1980. The appeal deserves dismissal and the same is, therefore, dismissed. No costs.

[A.L. DAVE, J.]

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